CASE NO.:
Appeal (civil) 8337-8339 of 1997

PETITIONER:
Union of India

RESPONDENT:
M/s. V. Pundarikakshudu and Sons and Anr.

DATE OF JUDGMENT: 09/09/2003

BENCH:
CJI & S.B. SINHA.

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The appellant and the first respondent herein entered into a contract for construction of an auditorium complex at Willington Nilgiris for a sum of Rs. 64,79,982.95. The work commenced on 16.3.1979 and was to be completed on 15.3.1981. However, there had been amendment to the said agreement owing to increase in the scope of work. An extra time of six months was also given to the contractor in terms of the said amendment. The time for completion of the contract was extended from 16.9.1981 to 30.6.1982 and 1.7.1982 to 31.12.1982. The contract amount was also increased, because of the aforementioned amendment therein owing to increase in the scope of work, to Rs. 85.10 lakhs. Although the period of contract was over and the appellant did not grant any further extension, the same was purportedly terminated by the appellant herein on 28.2.1983, i.e., after the due date for completion of work, namely, 31.12.1982. Disputes and differences having arisen, the arbitration agreement was invoked by the Respondent No.1 and the claims and counterclaims of the parties were referred to one Brigadier M.M.L. Sharma who was appointed by the Engineer-in-Chief of the appellant. Before the arbitrator the first respondent submitted a claim for a total sum of Rs. 23,59,534.72 comprising 23 claims whereas the claim of the appellant herein amounted to Rs. 90,58,167.42 comprising 8 claims.

The sole arbitrator awarded a sum of Rs. 14,31,463/- in favour of the first respondent and a sum of Rs. 33,95,000/- in favour of the appellant herein. The award was filed in the District Court of Nilgiris.

Original Petition No. 29 of 1986 was filed by the respondent No. 1 herein under Sections 15, 16, 30 and 32 of the Arbitration Act praying to very modify or set aside to claim No. 1 under 'B' Claim of the Government in Award dated 6.2.1986 and confirm the award in Claim 'q' of the contractor made including the interest and decree in favour of the petitioner or in the alternative to set aside the award dated 6.2.1986.

Original Suit No. 31 of 1986 was filed by the first respondent for passing a judgment and decree in terms of the award passed in favour of the Plaintiff in claims serial No. 'A" claims of the contractor by the 2nd defendant and directing the first respondent to pay the plaintiff Rs. 14,31,462 whereas Original Suit No. 47 of 1986 was filed by the Union of India for a decree and judgment in terms of the Award for a sum of Rs. 33,95,000/- with interest at 18% per annum with costs.

The learned District Judge upheld the said objections of the first respondent holding: as the arbitrator made an award in favour of the

first respondent presumably upon arriving at a finding that the appellant herein was responsible for causing delay in completion of the contract; the award made in favour of the appellant must be held to be inconsistent therewith.

It was further held that the appellant herein 'pushed in' some calculation sheets on the last date of hearing which was accepted by the arbitrator without assigning any reason and without prior intimation to the first respondent which amounted to misconduct on the part of the arbitrator. The Court further took into consideration the fact that the Union of India admittedly caused 1654 days' delay in accepting the designs and as the said admission was not taken into consideration by the arbitrator, that part of the award was vitiated.

The District Judge further held that having regard to the fact that the arbitrator had awarded compensation to the first respondent on various items including Claim A towards additional amount claimed due to escalation in prices of materials and men at 25% of the work done at the contract rates, loss sustained due to under-utilisation of cantering and shuttering materials, loss sustained due to underutilization, compensation for loss sustained on overheads due to prolongation of work, the impugned award cannot be sustained.

The learned District Judge furthermore laid emphasis on the claim towards extra expenditure incurred in dismantling of work done due to delays in decisions wherefor a sum of Rs. 12,500/- was awarded stating:

"...Therefore it is clear that there was a delay on the part of the department in taking decisions. Because of the delay in taking decisions, the Arbitrator has awarded the amount for delay solely on the part of the contract. I failed to understand why the sole arbitrator should have awarded Rs.12,500/ under claim No.V(a) of the contractor.

Referring to clause 54 of the Contract, the District Judge said:

"...Therefore condition 54 makes it abundantly clear that if there was any default on the part of the contractor the Union of India has got every right to impound the materials of the contractor, and at any time sell the materials and appropriate the proceeds towards any losses. Curiously enough under claim No.VI the Arbitrator has passed an award stating that the materials should be returned to the contractor. The approximate costs of the materials has been given as Rs.3,71,000/- by the contractor. Once again, it has to be stated that if the sole Arbitrator has come to the conclusion that the default was on the part of the contractor, he is not justified in directing the Union of India to hand over the materials. Since he has come to the conclusion that the Union of India is responsible for the breach of contract, the sole arbitrator has directed the Union of India to return the materials as the Union of India cannot take recourse under condition 54 of the General conditions of the contract IAFW 2249. On the background of this we have now considered the amount awarded to the Union of India under claim No.1, 2 and 4 under claim No.1 Rs.33,64,000/- has been awarded by the sole arbitrator towards extra expenditure involved to complete the incomplete item of work left by the defaulting

contractor. Once again going back to contractor is claim under claim No.6n it is clear that the findings of the (end of the original's 31st page) arbitrator under claim No.V of 'A' claim of the contractor and claim 1 of 'B' of the Government of India is inconsistent. Since the arbitrator has already come to the conclusion that the breach of contract was due to the 1st respondent and has directed the Union of India to return the materials to the contractor, the sole arbitrator should not have awarded Rs.33,64,000/- towards excess expenditure involved to complete the incomplete items of work left by the defaulting contractor. On the face of it the arbitrator awarded Rs.33,64,000/- under claim No.1 of 'B' claim of the Government is not sustainable.

Since the award of Rs.3,95,000/- by the sole arbitrator is inconsistent and is a misconduct, the order of the Arbitrator in respect of claim No.1 of 'B' claim of the Union of India in the award dated 6.3.1986 has to be set aside."

Aggrieved thereby three appeals being A.A.O. No. 364 of 1995, A.A.O. No. 366 of 1995 and A.A.O. No. 367 of 1995 were filed by the appellant against the order of District Court dated 21.2.1994 in O.P. No. 29/86, O.S. No. 31 of 1986 and O.S. No. 47/86 respectively.

By reason of the impugned judgment dated 6.1.1997 the said appeals were dismissed.

It, however, appears that the appellants herein also filed S.L.P. (Civil)....8317-8318/97 arising out of the judgment and order dated 06/01/97 in Appeal Nos. 242/95 and 243 of 1995 of the High Court of Madras questioning the award made in favour of the first respondent herein. The same was dismissed by this Court by an order dated 24.11.1997.

Mr. N.N. Goswami, the learned senior counsel appearing on behalf of the appellant would submit that the High Court as also the District Judge committed a manifest error in setting aside the award made by the arbitrator in favour of the appellant in so far as it failed to take into consideration that the award was a non-speaking one.

The learned counsel would contend that the appellant could be blamed for making delay in the matter and completion of job till 1982 but no finding has been arrived at nor could be arrived at on the basis of materials on records that thereafter it was at fault. No material has been shown in the impugned judgments which support the views taken by the courts below that the appellant was responsible for the delay caused beyond 31.12.1982. Mr. Goswami would urge that the District Judge had no jurisdiction to analyse the materials on records as if it has an appellate jurisdiction over the award of the arbitrate. The learned counsel would contend that the jurisdiction of the High Court in setting aside an award being limited, the impugned judgments cannot be sustained. In support of the said contention, strong reliance has been placed on M/s. Sudarsan Trading Co. Vs. Government of Kerala and Another [(1989) 2 SCC 38].

Mr. M.N. Rao, the learned senior counsel appearing on behalf of the respondent, per contra, would submit that a finding of fact has been arrived at to the effect that the award of the arbitrator was inconsistent. The learned counsel would submit that while considering

the validity or otherwise of an award the Court is not precluded from considering the totality of the circumstances. It was pointed out that having regard to the fact that the appellant admitted the delay of 1654 days on its part, the same ought to have been taken into consideration by the arbitrator, which was relevant for resolution of the dispute between the parties. The claims raised by the appellant basing on the purported breach of contract on the part of the first respondent herein must be held to be mala fide. The learned counsel has placed strong reliance in support of his contention on Dandasi Sahu Vs. State of Orissa [(1990) 1 SCC 214].

The short question which arises for consideration in these appeals is as to whether the District Judge and the High Court, Madras exceeded their jurisdiction in passing the impugned judgments.

It is not in dispute that the claims and counterclaims of the parties centred round determination by the arbitrator as to whether the appellant or the first respondent had committed a breach of contract. The power of the appellant to terminate the contract and to put forth the claim for extra expenditure involved to complete the incomplete items of work left out by the first respondent revolved round the issue as to whether it was a defaulter or not. The appellant could terminate the contract and get the work completed through another agency entitling it to lay the said claim, but its justifiability therefor indisputably would depend upon the interpretation of clause 54 of the Contract. The said clause empowers the appellant to cancel the contract, only if the contractor "fails to complete the works, work order and items of work, with individual dates for completion, and clear the site on or before the date of completion". Thus, the 'failure' must be on the part of the contractors and not by reason of acts of omissions and commissions of the appellant herein.

The following was furthermore contained in the said clause:

"The Government shall also be at liberty to use the materials, tackle, machinery and other stores on Site of the Contractor as they think proper in completing the work and the Contractor will be allowed the necessary credit. The value of the materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the Contractor and used by the Government in completing the work shall be assessed by the G.E. and the amount so assessed shall be final and binding.

In case the Government completes or decides to complete the works or any part thereof under the provision of this condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the contractor under the condition shall consist of the cost or estimated cost (as certified by G.E.) of materials purchased or required to be purchased and/ or the labour provided or required to be provided by the Government as also the cost of the Contractor's materials used with an addition of such percentage to cover superintendence and establishment charges as may be decided by the C.W.E., whose decision shall be final and binding."

The said clause could, thus, be invoked only on default on the part of the contractor and not otherwise.

Apart from the findings of the District Judge, as noticed

hereinbefore, the High Court also came to conclusion that the contract could not have been terminated after the date of completion of work holding:

"...Misconduct as defined under Section 30 is not a moral lapse. If the Arbitrator on the face of the award arrives at an inconsistent conclusion, it would also amount to misconduct as per the decision reported in Poulose vs. State of Kerala (AIR 1975 SC 1259). Therefore, the finding of the learned District Judge that there is an inconsistent conclusion by the arbitrator who has admitted the delay on the part of the Government in my opinion well-founded. It is more so, when the Government has not chosen to set aside that portion of the award which implies that there is delay on the part of the Government."

The High Court further opined:

"Clause 54 of the agreement provides for utilization of the materials machinery., tackle etc. for completion of the incomplete work and sell the same at any time and appropriate the sale proceeds towards the loss which may arise from the cancellation of the contract. In the case on hand, the cancellation of the contract is after the expiry of the time contended for completion of the contract. The materials, machineries etc. were ordered to be returned to the contractor or pay the costs of the same to the contractor. The non-utlisation of the materials has not been taken into consideration by the Arbitrator. It is contended that no payment was made to the machineries and the contract was at liberty to take in back the machineries and therefore the non-utilisation of the materials cannot be said to be a conduct which would absolve the liability of the Government. But, this contention is not tenable since when the contractor has attempted to remove the materials on the work it has been prevented and a complaint has also been lodged with the police. Therefore, awarding certain sum towards loss sustained by the Government on account of the delay said to have been committed by the contractor, is inconsistent with the award granted in favour of the contractor to get back the materials or value thereof from the Government. When the order of the Arbitrator is inconsistent, it amounts to a misconduct. Therefore, the learned District Judge has rightly set aside the claim No.1 under 'B' claim of the Government and I am of the opinion that it is not a matter to be interfered with this Court."

It is not the case of the appellant that the contractor was allowed to work after 31.12.1982 on grant of further extension for the completion of the work. The rights and obligations of the parties were, thus, required to be considered as on the said date and not thereafter. The fact that there had been delay of 1654 days on the part of the appellant in accepting the designs and there had been an amendment of the Schedule of the work stands admitted.

The question as to whether one party or the other was responsible for delay in causing completion of the contract job, thus, squarely fell for consideration before the arbitrator. The arbitrator could not have

arrived at a finding that both committed breaches of the terms of contract which was ex facie unsustainable being wholly inconsistent. Clause 54 of the contract could be invoked only when the first respondent committed breach of the terms of the contract. An action in terms thereof could be taken recourse to in its entirety or not at all. If one part of the award is inconsistent with the other and furthermore if in determining the disputes between the parties the arbitrator failed to take into consideration the relevant facts or based his decision on irrelevant factors not germane therefor; the arbitrator must be held to have committed a legal misconduct.

In Bharat Coking Coal Ltd. Vs. M/s. Annapurna Construction (Civil Appeal Nos. 5647-48 of 1997) disposed of on 29th August, 2003 this Court noticed:

"So far as these items are concerned, in our opinion, the learned sole arbitrator should have taken into consideration the relevant provisions contained in the agreement as also the correspondences passed between the parties. The question as to whether the work could not be completed within the period of four months or the extension was sought for on one condition or the other was justifiable or not, which are relevant facts which were required to be taken into consideration by the arbitrator.

It is now well settled that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract.

In Associated Engineering vs. Govt. of A.P. [(1991) 4 SCC 93], this Court clearly held that the arbitrators cannot travel beyond the parameters of the contract. In M/s. Sudarsan Trading Co. v. The Govt. of Kerala [(1989) 2 SCC 38], this Court has observed that an award may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has been determined outside the award, whatever might be said about it in the award by the Arbitrator. This Court further observed that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records."

It was held that if the arbitrator has committed a jurisdictional error, the court can intervene. This Court in Bharat Coking Coal Ltd. (supra) noticed its earlier decision in K.P. Poulose Vs. State of Kerala [(1975) 2 SCC 236] wherein it was observed that the case of legal misconduct would be complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives

at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision.

In Union of India vs. Jain Associates and Another [(1994) 4 SCC 665], this Court upon following K.P. Poulose (supra) and Dandasi Sahu (supra) held :

"8. The question, therefore, is whether the umpire had committed misconduct in making the award. It is seen that claims 11 and 12 for damages and loss of profit are founded on the breach of contract and Section 73 encompasses both the claims as damages. The umpire, it is held by the High Court, awarded mechanically, different amounts on each claim. He also totally failed to consider the counter-claim on the specious plea that it is belated counter-statement. These facts would show, not only the state of mind of the umpire but also non-application of the mind, as is demonstrable from the above facts. It would also show that he did not act in a judicious manner objectively and dispassionately which would go to the root of the competence of the arbitrator to decide the disputes."

In Dandasi Sahu (supra) this Court held that the award suffering from non-application of mind by the arbitrator is liable to be set aside. It was held:

"In this connection we have to keep in mind that we are concerned with a situation where the arbitrator need not give any reason and that even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same could not be assailed. The arbitrator, in the case of a reference to him in pursuance of an arbitration agreement between the parties, being a person chosen by parties is constituted as the sole and the final judge of all the questions and the parties bind themselves as a rule to accept the award as final and conclusive. The award could be interfered with only in limited circumstances as provided under Sections 16 and 30 of the Arbitration Act. In this situation we have to test the award with circumspection. Even with all this limitations on the powers of court and probably because of these limitations, we have to hold that if the amount awarded was disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct."

In M/s. Sudarsan Trading Co. (supra) this Court clearly held that the Court can look to the agreement where the question arises as to whether an award may be remitted or set aside on the ground that the arbitrator in making it has exceeded its jurisdiction. Drawing distinction between the disputes as to the jurisdiction of the arbitrator and the dispute as to in what way that jurisdiction should be exercised, this Court opined:

"The next question on this aspect which requires consideration is that only in a speaking award the court can look into the reasoning of the award. It is

not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao ((1987) 4 SCC 93). In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the court to interfere with the award. Further-more, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator. See the observations of this Court in MCD v. Jagan Nath Ashok Kumar ((1987) 4 SCC 497)."

In that case the Court was concerned with the first issue and not the second one wherewith we are concerned herein. In the fact situation obtaining therein the court distinguished a large number of authorities placed before it holding:

"But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator, had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

Such is not the position here.

In this case the District Judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent inconsistency contained therein. The arbitrator, as has been correctly held by the District Judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regard breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self contradictory.

The Union of India while accepting the award made in favour of the first respondent must be held to have accepted the finding that it committed a breach of contract and the said finding has attained finality and would operate as res judicata in view of the decisions of this Court in Sheodan Singh Vs. Daryao [(1966) 3 SCR 300].

Furthermore, as noticed hereinbefore, the appeal preferred by the

appellant against the award of the arbitrator made in favour of the first respondent herein has been dismissed.

In Premier Tyres Limited Vs. Kerala State Road Transport Corporation [1993 Supp (2) SCC 146] this court held:

"The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from.
5. Mention may be made of a Constitution Bench decision in Badri Narayan Singh v. Kamdeo Prasad Singh (AIR 1962 SC 338 : (1962) 3 SCR 759 : 23 ELR 203). In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed,
"We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect."

As the appellant failed to get that part of the award which was made by the arbitrator in favour of the first respondent, set aside, the basic conclusion of the High Court cannot be faulted. The Court upon setting aside the whole award could have remitted back the matter to the arbitrator in terms of Section 16 of the Act or could have appointed another arbitrator, but at this juncture no such order can be passed as the award in part has become final.

For the reasons aforementioned, we are of the opinion that the impugned judgment does not suffer from any legal infirmity. These appeals are, therefore, dismissed. No costs.